RHB BANK BHD

v.

ZALIFAH JUAN & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[ORIGINATING SUMMONS NO: OS-24-210-2005-III(II)]
7 OCTOBER 2005

BANKING: *Banks and banking business - Loans secured by assignment - Whether assignment is absolute - Whether an absolute assignment amounts to an equitable mortgage as opposed to an equitable charge*

CIVIL PROCEDURE: *Action - Charge action - Whether O. 83 Rules of the High Court 1980 refers only to charge actions*

CIVIL PROCEDURE: *Specific Relief - Application under Specific Relief Act 1950, s. 41 - Whether defendants were denying plaintiff's rights*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of court - Whether court has inherent jurisdiction under common law and O. 92 r. 4 RHC - Circumstances when inherent jurisdiction may be invoked*

LAND LAW: *Mortgage - Equitable mortgage - Whether holder of equitable mortgage must apply to court to exercise its contractual rights to sell property - Whether O. 31 r. 1 RHC provides court with jurisdiction to order judicial sale*

The defendants purchased a piece of land and house ("the property") and to finance the purchase the defendants obtained a term loan from the plaintiff. As security for the term loan the defendants executed a loan agreement cum deed of assignment dated 23 May 2001 ("the LCDA") as the individual title deed to the property was and still is not available. The LCDA provided that the borrower absolutely assigned all of the borrower's rights and title to and interest in the property to the bank. The LCDA also provided that in the event of default the facility and interests thereon shall become forthwith due and payable whereupon the bank shall be entitled without further notice to the borrower, sell, transfer or assign the property as the bank shall in its absolute discretion think fit.

The defendants defaulted on the repayment of the term loan and the plaintiff's solicitors wrote to the defendants to demand the repayment of the outstanding loan. There was no reply from the defendants and in view of that the plaintiff applied to court by encl. 2 (under O. 83 and 31 of the Rules of High Court ('RHC')) seeking the following declarations: (i) the exact amount due and owing by the defendants to the plaintiff in respect of the LCDA; (ii) that the plaintiff was the beneficial owner of the property by virtue of the loan agreement; (iii) that the plaintiff be given liberty to sell the property by public auction to be fixed by the deputy registrar, High Court, Kuching based on a valuation report; (iv) that plaintiff be empowered and authorised to do all whatsoever acts and execute all whatsoever documents to give effect to any sale by private treaty *etc*; (v) that the defendants pay the plaintiff costs on a solicitor-client basis; and (vi) to determine the manner in which the purchase price or proceeds of sale thereof should be applied.

The defendants who were present in court did not raise any objection to the plaintiff's application except to request for time to regularise the account. The issues for determination were: (a) whether or not the court had the jurisdiction under O. 83 RHC, O. 31 r. 1 RHC and s. 41 of the Specific Relief Act 1950 to entertain the plaintiff's application where there was in fact no dispute between the plaintiff and defendants in respect of the default of the term loan and the legality or enforceability of the LCDA; and (b) whether the court should exercise its inherent jurisdiction to entertain the plaintiff's application.

Held (dismissing encl. 2 with no order as to costs):

[1] To determine whether or not the LCDA was an absolute assignment, the court had to look within the four corners of the LCDA. The LCDA here was an absolute assignment and, as such, making it an equitable mortgage as opposed to an equitable charge. This being the case, O. 83 RHC would not provide a leg for the plaintiff to stand on as the *Phileoallied Bank* case held that O. 83 RHC refers only to charge actions.

[2] There is no statutory or common law requirement for the holder of an equitable mortgage to apply to court to exercise its contractual right to sell the property. Order 31 r. 1 RHC itself does not provide the court jurisdiction to grant the reliefs as prayed for in encl. 2 *ie*, to order a judicial sale.

[3] Even if O. 31 r. 1 RHC gives the court jurisdiction to order a judicial sale, the learned judge declined to exercise that power. As pointed out in the case of *Yong Hin Seong & Anor v. Yong Teik Seong*, the operative words in the aforesaid order are "it appears necessary or expedient". The circumstance in this case did not appear necessary or expedient for the court to order a judicial sale. The facts as stated were that the plaintiff had all the rights under the moon so to speak to sell the property without having to resort to court.

[4] Further, in applying to this court the plaintiff incurred further costs for the defendant. It did not appear fair to the court that a borrower who had paid the legal fees and costs for the LCDA, which he had not challenged at all, has to incur further costs solely for the plaintiff's purpose of getting a judicial blessing for the proposed sale.

[5] Another reason why the court would not entertain the plaintiff's application was that there was actually no dispute or live issue before the court. The plaintiff was in effect saying there might be a dispute in the future, so I better protect myself for that eventuality. Courts exist to adjudicate where there is a dispute.

[6] Section 41 of the Specific Relief Act 1950 contains pre-conditions and the plaintiff had not satisfied one of those preconditions. The plaintiff had not shown to the court that the defendants were denying the plaintiff's rights under the LCDA. The defendants had no quarrels at all with the plaintiff.

[7] There is no doubt that the court has inherent jurisdiction under common law and O. 92 r. 4 RHC. The very soul of this inherent jurisdiction is to do justice between the parties. The common thread in the authorities cited is that the courts invoked their inherent powers to ensure justice is dispensed to the litigants. Here, there was no dispute between the parties. The plaintiff was not being subjected to any actions which were unjust to them. The defendants were not abusing the due process of the courts. The facts contained no controversy and therefore did not cross the threshold to warrant the court to draw on its inherent powers.

Case(s) referred to:

Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co [1995] 3 CLJ 234 HC ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Syed Kechik Syed Mohamed & Anor v. Board of Trustees of Sabah Foundation & Ors and Another [1999] 1 CLJ 325 FC ***(refd)***
Tan Beng Sooi v. Penolong Kanan Pendaftar [1995] 2 CLJ 846 HC ***(refd)***
Wicks v. Wicks [1998] 1 All ER 977 ***(refd)***
Yong Hin Seong & Anor v. Yong Teik Seong [2003] 6 MLJ 38 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 31 rr. 1, 2, 64, O. 83, O. 92 r. 4
Specific Relief Act 1950, s. 41

For the plaintiff - Lim Lip Sze; M/s Reddi & Co
Defendants in person

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah JC:
By encl. 2, the plaintiff comes to the court under the umbrella of O. 83 and 31 of the Rules of High Court (RHC) to seek the following declarations:

1. that the amount due and owing by the defendants to the plaintiff in respect of the loan agreement cum deed of assignment dated 23 May 2001 (hereinafter referred to as "the LCDA") is in the sum of RM90,477.42 as at 31 November 2005 and interest continue to accrue thereon at the rate of 1.25% per annum above the plaintiff's base lending rate (which is currently at 6.00% per annum) (hereinafter referred to as "the prescribed rate") calculated on monthly rests and an additional interest of 1% per annum above the prescribed rate is chargeable in the installments in arrears from 1 June 2005 until date of full and final settlement,

2. that the plaintiff is the beneficial owner of the property described as Sublot 114B (Phase 11B) together with one (1) unit of single storey corner terrace house erected thereon or to be erected thereon, containing an area of 297.3 square metres, more or less, and situate at Bandar Semariang Township, Kuching, being part of Lot 847, Block 9, Salak Land District (hereinafter referred to as "the property") by virtue of loan agreement made between the plaintiff and the defendants,

3. the plaintiff shall be at liberty to sell the property by public auction to be fixed by the deputy registrar, High Court, Kuching based on a valuation report from a registered valuer or by private treaty or tender in a manner as the plaintiff thinks fit,

4. in the event that the plaintiff is at liberty to sell the property by private treaty or tender or in any manner as the plaintiff or any of its authorized attorneys shall be empowered and authorized to do all whatsoever acts and execute all whatsoever documents to give effect to such sale which the plaintiff may deem necessary and to give a good receipt for the purchase moneys received and also to do and perform all whatsoever acts matters and things necessary or expedient as fully and effectually as the defendants could do themselves as if they were personally present,

5. that the defendants do pay the plaintiff costs on a solicitor-client basis,

6. that the purchase price or proceeds of sale thereof be applied and paid in the following manner:

   (i) to settle all tax payable under the Real Property Tax Act 1976,

   (ii) to settle all quit rents, assessment rated, maintenance fees, service charges and other outgoings of the property,

   (iii) to settle all costs due hereunder calculated on a solicitor-client basis inclusive of all other expenses and charges incurred in the valuation of the property, costs and charges incurred in preservation and protection of the plaintiff' interest in the property and generally all other expenses and charges in respect of the sale if the property,

   (iv) to settle all amount owing by the defendants to the plaintiff under the loan agreement, and

   (v) the balance, if any, to be paid to the defendants.

Backgrounds

By a sale and purchase agreement dated 2 March 2001, the defendants purchased the property from Projek Bandar Samariang Sdn Bhd. To finance the purchase, the defendants obtained a term loan from the plaintiff for a sum of RM90,000. As security for the term loan the defendants executed the LCDA on 23 May 2001as individual title deed to the property was and still is not available. The term loan is repayable on demand. For the purpose of this matter the relevant provisions in the LCDA are as follows:

Section 13.01 Absolute Assignment

In consideration of the Facility granted to the Borrower upon the terms and conditions contained in this Agreement, the Borrower as beneficial owner hereby absolutely assigns all of the Borrower's rights and title to and interest whatsoever in the Property including all rights interest and benefits of the Borrower in the Sale and Purchaser Agreement to the Bank.

Section 7.01 Execution of Charge

The Borrower shall simultaneously with the execution of this Agreement execute in favour of and deliver to the Bank a charge in escrow upon the terms and conditions as the Bank may require as a security for the Facility interest thereon and all other moneys owing and payable by the Borrower under the terms of this Agreement, such charge in esrow shall be perfected and presented for registration upon issuance of a separate title to the Property.

Section 10.02 Right of Bank on Default

If a default pursuant to Section 10.01 or if any of the events stipulated in Section 10.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven days from the date of notice by the Bank requesting remedy of the same, or is not remedied within the time specifically stipulated therefore (if any) in respect of the event in question, the Advances, the Facility and interests thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Bank shall be entitled without further notice to the Borrower:

(a) XXXXXX

(b) XXXXX

(c) Sell, transfer or assign the Property or any part thereof as the beneficial owner thereof at such price and in such manner and subject to such conditions as the bank shall in its absolute discretion think fit free from any interest of the Borrower hereunder or otherwise and no assignee or purchaser of the Bank shall be required or concerned to see whether any such default has in fact been made of the Borrower or any other occasion has arisen for the exercise of the Bank's rights and power of the assignment or of the sale hereunder.

The defendants defaulted on the repayment of the term loan and on 6 May 2004 the plaintiff's solicitors wrote to the defendants to demand the repayment of an outstanding loan of RM89,141.24. There was no reply from the defendants and in view of that the plaintiff come before this court to get reliefs as set out in encl. 2. There is no dispute from the defendants that they had defaulted in the repayment of the term loan and also had not questioned or

challenge the legality or enforceability of the LCDA. The defendants who were present in court did not raise any objection to the plaintiff's application except to request for time to regularize the account.

Contentions Of The Plaintiff

Learned counsel, when asked under what provisions of the law he is relying on in this application, replied that he relies on O. 83 RHC, O. 31 RHC, s. 41 of the Specific Relief Act, and under the inherent jurisdiction of the court. The last two grounds were not referred in encl. 2 and were only orally raised and relied on at the hearing on 6 October 2005. Be that as it may, I allowed learned counsel to also rely on those two grounds following the dicta in the recent case of *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889 where Richard Malanjum JCA (as he then was) reiterated the principle in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 (FC) that courts should not be unduly worry about technicalities and due consideration should be given to the salutary notion that courts exist to do justice.

Issues

1. Whether or not this court has the jurisdiction under O. 83 RHC, O. 31 r. 1 RHC and s. 41 of the Specific Relief Act to entertain the plaintiff's application where there is in fact no dispute between the plaintiff and defendant in respect of the default of the term loan and the legality or enforceability of the LCDA?

2. Should this court exercise its inherent jurisdiction to entertain the plaintiff's application?

Decisions Of The Court

O. 83 RHC

The first matter I have to determine is whether or not the LCDA is an absolute assignment. In determining that I have to look within the four corners of the LCDA as required by the Federal Court in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231.

Similar provisions as set out above were considered in the case of *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 (hereinafter called *Phileoallied Bank* case). The Federal Court referred to three provisions which are:

8. ASSIGNMENT

For the consideration aforesaid the Borrower hereby absolutely assigns to the Bank the full and entire of the Borrower's benefits rights title and interest in and to and under the Sale Agreement and in the said Property together with the Borrower's right of enforcement thereof or thereunder PROVIDED ALWAYS that notwithstanding the Assignment hereinbefore contained or any other provision of this Assignment the Borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower expressed and contained in the Sale Agreement.

23. POWERS ON DEFAULT

The Bank may at any time after an event of default or in making demand be entitled to exercise all or any of the rights and powers following:

23.1 xxx;

23.2 xxx;

23.3 xxx;

23.4 the right and power to sell and assign the said Property as the absolute unencumbered owner thereof at such price or prices and in such manner as the Bank shall in its absolute discretion think fit free from any interest of the Borrower hereunder or otherwise and to apply the proceeds of sale in or towards the satisfaction of the amount hereby secured and all the principal and interest and other monies due to the Bank hereunder, the payment to the relevant authorities of all quit rent, assessment, drainage, rates and other outgoings payable in respect of the said Property, the payment to the Developer or the Management Corporation constituted under the Strata Titles Act 1985/the Land Ordinance (Sabah Cap 68) and the Land (Subsidiary Title) Enactment, 1972 (Sabah) the Land Code of Sarawak and the Strata Titles Ordinance 1972 (Sarawak), as the case may be, of all service charges and maintenance fees payable in respect of the said Property and all costs expenses dues and fees including the Bank's solicitor's costs on a solicitor and client basis and fees of the valuer real estate agent, if any, and the residue, if any, only shall be payable to the Borrower and no assignee or purchaser from the Bank shall be concerned to ascertain whether or not any such default has actually arisen so as to entitle the Bank to exercise its powers of sale and assignment. And the Borrower shall hereby expressly agree covenant and undertake to do and execute all acts, deeds, instruments and things which the Bank may require or stipulate for the purpose of effecting and/or completing anything and/or any transaction mentioned in this Clause.

26. ISSUE OF SEPARATE DOCUMENT OF TITLE

Upon the issue of a separate issue document of title/strata title, as the case may be, to the said Property, the Borrower shall at its own cost and expense and upon being so required to do by notice in writing from the Bank take a transfer of the said Property from the Bank if the same shall have been transferred to the Bank as assignee under the Sale Agreement or if the Bank so deems fit as its absolute discretion directly from the Developer, as the case may be, and shall execute and deliver to the Bank a charge under the National Land Code, 1965 or the Land Ordinance (Sabah Cap 68) or the Land Code of Sarawak, as the case may be, in such form and containing such terms and conditions as may be prescribed by the Bank over the said Property in favour of the Bank to secure the repayment to the Bank of the Banking Facilities and all other monies together with interest thereon at the relevant Prescribed Rate payable and owing by the Borrower by virtue of this Assignment at the date of the execution of the said charge and notwithstanding the completion and perfection of the said charge this Assignment shall as regards any antecedent default by the Borrower remain in full force and effect.

The Federal Court held as follow:

Clause 8 thus makes it clear that, upon its true construction, this is an absolute assignment under s. 4(3) of the Civil Law Act 1956 (hereinafter "the CLA") which states:

(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

Section 13.01 of the LCDA contains substantially similar terms as cl. 8 in *Phileoallied Bank* case *(supra)* and based on the aforesaid authority, I hold that the LCDA is an absolute assignment and as such making it an equitable mortgage as opposed to an equitable charge. Counsel for the plaintiff agreed to my construction of LCDA as an equitable mortgage. This being the case, O. 83 RHC does not provide a leg for the plaintiff to stand on as the *Phileoallied Bank case (supra)* held that O. 83 RHC refers only to charge actions.

O. 31 r. 1 RHC

This brings me to O. 31 RHC which states as follows:

> Power to order sale of immovable property. (O. 31 r. 1)
>
> Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

In the English case of *Wicks v. Wicks* [1998] 1 All ER 977, the Court of Appeal held that O. 31 r. 1 (similar to our O. 31 r. 1 RHC) does not confer jurisdiction on the court where none existed otherwise. It is merely a procedural provision. In that case the facts are that the parties were involved in a divorce proceeding. The husband had transferred the matrimonial home which he purchased to the sole name of wife. When the marriage broke down, she with the children left the matrimonial home and lived in rented premises. Petition for divorce were filed and decree nisi were granted in October 1996. In May 1997, the wife gave notice that she is moving out of the rented premises and sought to sell the matrimonial home. The husband objected to the sale and refused to yield possession on the ground that he had an interest in the matrimonial home. The wife filed an application, prior to the hearing of ancillary relief proceedings for (1) that the matrimonial home be sold forthwith pursuant O. 31 r. 1 RHC and r. 2. 64 of the Family Proceedings Rules 1991, (2) that the husband delivers vacant possession of the matrimonial home and (3) the proceeds from the sale be partly given to her to purchase another party. The judge in the first instance granted the application holding that the court had pending determination of the ancillary proceedings, had the power to do so on the basis of the equitable doctrine of appropriation or under the inherent jurisdiction, as a matter of procedure, to ensure fair play pending the final hearing and to achieve a just fair and equitable result. The husband appealed.

The English Court of Appeal upheld the appeal on the ground that O. 31 r. 1 does not confer jurisdiction on the court where there is none. Further the court held that it cannot rely on the inherent jurisdiction to equate procedural law to substantive law.

The *dicta* of *Wicks v. Wicks (supra)* were accepted by the Federal Court in the *Philleoallied Bank* case. One of the grounds of appeal of the appellant in the *Philleoallied Bank* case was that the Court of Appeal had erred in not following *Wicks v. Wicks (supra)*. On this aspect, the Federal Court held as follows:

> … Order 31 of the Rules is also, in our view, a procedural non mandatory provision to be resorted to in certain circumstances which are not relevant to the question posed.
>
> As stated in the Malaysian High Court Practice 1998 Desk Edition vol. 1 at p. 2227, O. 31 of the Rules applies to any action or proceeding which relates to land and in which it is necessary or expedient to have such land or any part thereof sold. The power to order such sale is conferred by item 3 of the Schedule to the CJA. It cannot apply to charge actions which fall under O. 83 of the Rules and to foreclosure proceedings where the land is charged under the National Land Code. The court may only order a sale whenever it is necessary for the purposes of the action but it is not intended to enable the court to sell real estate when otherwise it has no power to do so (see *Re Robinson, Pickard v. Wheater* [1886] 31 Ch D 247 at 249).
>
> All things considered, we were more inclined to agree with learned counsel for the appellant in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

From the above *dicta*, one can surmise that (1) there is no statutory or common law requirement for a holder of an equitable mortgage to apply to court to exercise its contractual rights to sell the property and (2) that O. 31 r. 1 RHC itself does not provide this court the jurisdiction to grant the reliefs as prayed in encl. 2.

In view of the aforesaid, I hold that O. 31 r. 1 does not confer this court the jurisdiction to order a judicial sale as requested by the plaintiff.

Even if O. 31 r. 1 RHC gives this court the jurisdiction to order a judicial sale, I would not exercise that power. As pointed out in the case of *Yong Hin Seong & Anor v. Yong Teik Seong* [2003] 6 MLJ 38, the operative words in the aforesaid order are "it appears necessary or expedient". In my view the circumstance in this case does not appear necessary or expedient for this court to order a judicial sale. The facts as stated above are that the plaintiff have all the rights under the moon so to speak to sell the property without having to resort to court. The Federal Court in *Philleoallied Bank* case said they can do so by exercising their contractual rights. Further in applying to this court the plaintiff is incurring further costs for the defendant (Section 17.06 of the LCDA stipulates that all costs in connection with LCDA are to be paid by the defendant/borrower and also prayed for in prayer (f)(iii) in encl. 2.) It just does not appear fair play to this court that a borrower who had paid the legal fees and costs for the LCDA, which he had not challenged at all, has to incur further court costs solely for the plaintiff's purpose of getting

a judicial blessing for the proposed sale. It begs the question why bother having an agreement when there is no intention to exercise their rights provided therein. One consequence which we should not forget is in filing this sort of application it adds more works to the courts unnecessary. One of the reliefs sought for involves the deputy registrar who in effect becomes the judicial guardian of the proposed sale.

Another reason why this court would not entertain the plaintiff's application is that there is actually no dispute or live issue before this court. The plaintiff are in effect saying there may be a dispute in the future, so I better protect myself for that eventuality. Courts exist to adjudicate where there is a dispute. I refer to the *dicta* of Edgar Joseph Jr FCJ (as he then was) in *Syed Kecik bin Syed Mohamed & Anor v. Board of Trustees of Sabah Foundation & Ors and Another* [1999] 1 CLJ 325 wherein his Lordship stated:

> Having said that, this Court does not sit to decide abstract on academic questions of law regarding which the parties are not in dispute. As Lord Bridge stated in *Ainsbury v. Millington* [1987] 1 All ER 929:
>
> > When the appeal was called on for hearing before the Appellate Committee your Lordships required to be satisfied that the appeal could properly be entertained having regard to the termination of the parties' tenancy of 24 Marlowe Close to which the respondent's case had directed attention. The principle was clearly stated by Viscount Simon LC in *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 at 470-471, [1944] AC 111 at 113-114, where he said:
> >
> > > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.
>
> It is always been a fundamental feature of our judicial system that Court decides dispute, between the parties before them, they do not pronounce judgment on an abstract question of law when there is no dispute to be resolved.

Section 41 Of The Specific Relief Act

I come now to s. 41 of the Specific Relief Act which states as follows:

> 41. Discretion of court as to declaration of status or right.
>
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

Learned counsel refers to illustration (b) of the section which states as follows:

> A covenants that, if he should at any time be entitled to property exceeding $100,000.00 he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

The aforesaid section contains preconditions and with respect to learned counsel, the plaintiff had not satisfied one of those preconditions and that is the plaintiff have not shown to this court that the defendants are in fact denying or even interested in denying the plaintiff's rights under the LCDA. As stated above there is no live dispute before the court. Illustration (b) does not help the plaintiff's case as A (in the illustration) had the intention to dispute the covenant he signed. In our present case the defendants have no quarrels at all with the plaintiff.

Inherent Jurisdiction

I deal now with the inherent jurisdiction of this court which learned counsel urges me to exercise and grant the reliefs sought for in encl. 2. There is no doubt that I have this inherent jurisdiction under common law and O. 92 r. 4 RHC (refer to *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147).

The question is then should I exercise the inherent jurisdiction which I possess. When asked that question, learned counsel said that as the defendants had defaulted in their repayment of the term loan and also the plaintiff is seeking remedy from the court for recovery of the loaned amount, this court ought to exercise its inherent power to order a judicial sale. I think we should be reminded ourselves why the courts have this inherent power. Order 92 r. 4 RHC makes it clear when it states:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

What injustice have the plaintiff suffered or are suffering? Have the defendants abused the process of the courts? The answers are obviously none.

The very soul of this inherent jurisdiction is to do justice between the parties. As Sir Jack Jacob QC in his article "*The Inherent Jurisdiction of the Court* (1980) Current Legal Problems 23, states:

> ... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

The above observation was quoted with approval by Edgar Joseph Jr FCJ(as he then was) in *R Rama Chandran v. The Industrial Court of Malaysia & Anor (supra)*. An example of when the court will use its inherent jurisdiction can be found in the case of *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 where Edgar Joseph J Jr, (as he then was), held that the courts in Malaysia by virtue of their inherent powers can grant Mareva injunctions when at that point in time Mareva injunctions did not exist in our jurisdiction. In that case, the relief sought for was to restrain the defendants from disposing the proceeds of a sale pending the disposal of the suit as there was fear that the defendants might dissipate their assets.

In *Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co* [1995] 3 CLJ 234. Vincent Ng J stated that the court could invoke its inherent jurisdiction to make an order for taxation beyond the prescribed period where the facts disclose serious misconduct on the part of a lawyer in respect of overcharging or fraud. Similarly, in *Tan Beng Sooi v. Penolong Kanan Pendaftar* [1995] 2 CLJ 846 Low Hop Bing JC ruled that the inherent jurisdiction of the court 'must be applied to do justice to the parties and to secure fairness in a trial between them, but not for any other purpose such as taking away the substantive rights of a litigant'. The common thread of the aforesaid cases is that the courts invoked their inherent powers to ensure justice is dispensed to the litigants.

Applying the above principles, I have to make sure that we have a situation which calls my intervention. As stated earlier by me, there is no dispute between the parties. The plaintiff are not being subjected to any actions which are unjust to them. The defendants are not abusing the due process of the courts. In another word the facts before me simply contain no controversy. It simply never crossed the threshold which warrants me to draw on my inherent powers. I repeat again. The plaintiff's contractual rights have not been disputed. They are in tact and it is incumbent on them to exercise those rights without the aid of the courts.

One final issue which I wish to pose to learned counsel is whether or not the defendants are rightly sued. Under the LCDA, there is an absolute assignment by the defendants. Based on the authority of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, one can argue that the defendants in this case have no *locus standi* to be sued. In the aforesaid case, there was an absolute assignment like in the present case. The appellant/assignor took out an action against the respondent/assignee to seek for certain declaratory reliefs. The respondent/assignee raised a preliminary objection that the action could not be maintained in the name of the appellant as assignor as he had assigned everything. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed. The Federal Court (Wan Suleiman, Seah and Mohamed Azmi, FJJ) held that as the relevant documents amounted to an absolute assignment not purporting to be a charge only the appellant/assignor was not competent to maintain the action when it was filed. Conversely in the present case, the Defendants cannot be sued as they have assigned everything. As this point was not canvassed in arguments, it would not be fair that I make any ruling on this. As such I shall not do so.

For reasons given above, I dismiss encl. 2 with no order as to costs.